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No. 84-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

Petitioner,

v.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY MEMORANDUM

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A. The employers respond that our argument on the language of the agreement is "purely semantic". Brief in Opposition at 16. We make no apology if our primary concern is with the language the parties themselves chose to include in their collective bargaining agreement. The process of interpreting and construing any contract "requires a determination of the meaning of the *language used*, not the ascertainment of some possible but unexpressed intent of the parties." *Joy v. St. Louis*, 138 U.S. 1, 34 L.2d 843 (1891) (emphasis added). In this case, the particular "language used" by the union and the employers in expressing agreement on mid-term changes in wage rates was "increase", not "decrease"; and that choice of words should be the most important determinative factor of this case.

At no point in the proceedings below or now in their brief to this Court have the employers ever satisfactorily explained why the term "decrease" was not included in the agreement along with "increase", if the parties really intended to permit downward adjustments in wages. True, the employers suggest that the possibility of decreases was "far from anyone's mind" during the critical 1967 negotiations because "at that time and for many years prior thereto every collective bargaining agreement in the building trades brought forth wage increases." Brief in Opposition at 16. But if the parties agreed upon a wage formula in 1967 without any thought to the matter of decreases, as the employers assert, how can the employers also argue that that formula now authorizes decreases? Can it really be said that the parties "mutually intended" something which, the employers tell us, was "far from anyone's mind" and which is the very opposite of the language used? The law of contracts does not in this manner burden a contracting party with risks never assumed. *See II Restatement of the Law of Contracts*, § 502.

B. The employers stress repeatedly that the change in the wage formula in 1967 was solely intended to account separately for increases in the fringe benefits of other trades; and that even after 1967, elevator constructor wages are still based upon the average wage rate of the other trades. *See* Brief in Opposition at 18. The union has never denied that the wage formula of Article V continues to involve "averaging" of the rates of other trades. However, it is undeniable that the "pure", simple averaging of other trades' rates that determined the elevator constructor rates prior to 1967 was replaced with a more complicated, multi-step process, which looked instead to the "average gross increase" obtained by the other trades to "be added to the existing wage rate of the Elevator Constructor Mechanic." *See* Petition at 4-5, fn. 3. If the employers wished the post-1967 agreement to provide for

the same possibility of decreases that was inherent in the "simple averaging" language of the pre-1967 agreement, they should never have consented to a new provision framed solely in terms of "increases" to be "added" to existing wage rates.

C. If the union really believed that it had won a wage provision that protected against decreases, the employers argue, surely the union would have publicized that fact to its members immediately after the 1967 negotiations. Brief in Opposition at 9, 16. If, however, as the employers have repeatedly stressed, the wage rates of the other trades were still increasing in 1967 and decreases were not then a likely possibility, there would have been no great incentive for the union to "crow" about the protection against decreases at that time. That could be saved for a future time when the protection was actually needed. The fact that a gain of less immediate significance (though, as things turned out, of great potential value) was not publicized at the time does not justify the inference that the gain was never achieved.

Moreover, we have never contended that preventing decreases was the union's sole objective in 1967 when the wage formula was changed; we have readily acknowledged that a desire to take advantage of the other trades' gains in fringe benefits was the prime motivation for the change in formula. *See* Petition at 21a. But in effecting that change, the union had the foresight to ensure that the new formula of the agreement was designed in a way that could not result in a wage decrease, should the economic climate prove more unfavorable in the future. The arbitrator should have enforced that agreement as written by the parties themselves in 1967, rather than rewriting its terms on the basis of a disputed reconstruction of bargaining history.

CONCLUSION

The arbitrator's decision does not draw its essence from the parties' agreement. Accordingly, the decisions below, enforcing the arbitrator's award, are in conflict with the decisions of this Court and other courts of appeals. In view of the role of arbitration in this country's labor relations, the question presented in this case is of sufficient importance to warrant this Court's attention. Accordingly, the writ of certiorari should be granted.

Respectfully submitted,

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